THE JUDICIAL USE OF TORTURE.

PART I.

TO a person with a philosophic turn of mind the interest in history consists not so much in what men have done in the past as in the reason why they have done it. This is especially true of the use of torture, in itself the most revolting chapter in history, but one which has a peculiar moral value as showing the terrible results that may come from erroneous legal theories; for, strange as it may seem, the habitual resort to torture in trials has been mainly due, not to a thirst for vengeance or to wanton cruelty, but to highly artificial principles of law devised without a consciously cruel intent. The practice has, in fact, been far less common in barbarous ages than in periods of civilization and refinement.

The earliest use of torture of which we have much knowledge was in Athens and Rome. Among the Greeks and under the Roman Republic torture was almost entirely confined to slaves, as a rule no free citizen being subjected to it; and in Rome, indeed, the exemption was one of the privileges of citizenship. The reason for torturing slaves is to be found, no doubt, in the belief that the slave, being absolutely at the mercy of his master, would naturally testify in accordance with the master's wishes, unless some stronger incentive to speak the truth were brought to bear. The law provided, therefore, not that he might be tortured if suspected of falsehood, but that his evidence could never be given without it, the defeated party in the suit paying to the master any damages sustained by a permanent injury to the slave. Now it may be observed that this rule of law rested on a theory of evidence, the theory that the testimony of a slave freely given was so unreliable as to be altogether inadmissible, and hence it applied to all cases, whether civil or criminal, and whether the slave himself was accused of wrongdoing or not. The inhuman character of the theory is the more shocking when we reflect that the slaves usually belonged to the same race as their masters, were sometimes on a footing of intimacy, and were often intrusted with highly important matters, which must have made their evidence in civil suits indispensable. Among them, moreover, were men of education;

many physicians, for example, belonging to this class. And yet, pitiless as the theory was, it clearly did not spring from diliberately cruel motives, because it applied whether the conduct of the slave had given any one cause for anger or not.

Such was the use of torture in Greece. It was the same in Rome during the period of the Republic; but after the creation of the Empire a change in the law began to take place. The species of jury which had been in use gradually disappeared, and the ordinary criminal procedure assumed more and more the form of an inquest by the magistrates. At the same time the importance of protecting the head of the state as the source of law or order, and the natural desire of the Emperor to surround himself with safeguards, caused the *crimen læsæ majestatis*, or high treason, to be treated as one of peculiar atrocity, and torture was permitted even in the case of free persons accused of it, — a rule which was afterwards applied to other grave offences, although with a number of exemptions in favor of men of high rank. Thus torture ceased to be used solely in consequence of a rule of evidence about the testimony of slaves, and grew to be also a means of convicting freemen charged with heinous crime. But it never developed in Rome into the systematic engine of criminal procedure that it became in modern times.

After the barbarian invasions and the fall of the Roman Empire of the West, Roman law decayed, and with it torture for freemen disappeared everywhere, except in Spain. The Teutonic tribes no doubt resorted to it occasionally to extort confession or gratify revenge, but their legal notions were far too crude to make it a regular part of the judicial machinery. Crime was regarded by them as a private wrong, and no clear distinction was drawn between civil and criminal proceedings. Nor were they perplexed by the difficulty in discovering the truth, which presents the chief obstacle to the detection and punishment of crime in highly civilized communities. To them the main problem was to ascertain the law; the facts could be determined by a number of simple tests. One of the most ancient and common of these was compurgation, whereby the accused took an oath that the charge against him was false, and produced a fixed number of his kinsmen or neighbors who swore that his oath was pure and true. Other forms of trial involved an appeal to God, a miracle attesting the innocence or guilt of the accused. To this class belonged the various kinds of ordeal; the ordeal by water, where the victim on

being thrown into the water sank if innocent, and floated if guilty; the ordeal of the corsnaed, reserved chiefly for priests, where a morsel of consecrated bread or cheese was used, which the innocent alone could swallow without choking; the ordeal of boiling water and hot iron, where the accused thrust his arm into a boiling caldron or carried in his hand a piece of hot iron, guilt being proved by the failure of the wound to heal in three days. It seems at first sight surprising that the futility of such tests was not felt; but in point of fact the question to what ordeal the accused should be put, and the severity of the ordeal itself, — the depth, for example, to which the arm should be plunged into the water, or the weight of the iron and the distance it must be carried, — depended in part on the known character of the accused, and the amount of evidence against him; so that the result of the test was apt to accord with the previous opinions of the people.

Another form of appeal to the judgment of God was the wager of battle. The origin of the custom cannot be traced, for it is found everywhere in Europe at the dawn of history, but it was peculiarly suited to the spirit of chivalry, and grew rapidly in popularity when feudalism gained a firm foothold, becoming at last the common form of trial for men of knightly rank. The person accused of crime had a right not only to fight his accuser, but to challenge a hostile witness, and sometimes even a judge whom he charged with an unfair decision. Before the combat each contestant took a solemn oath to the justice of his cause, and hence the defeated party was not only proved to be in the wrong, but was convicted of perjury, and was liable to be punished accordingly. Women, priests, children, old men and cripples, who were naturally unable to fight in person, appeared by champion, and this privilege, which was at times extended to able-bodied men, became a source of scandal, the champions being, of course, in the end mere hired ruffians. But the public confidence in this form of appeal to the Divine justice was exceedingly strong, and tales were told of miraculous defeats of wicked knights by their feebler but righteous antagonists.

So long as the belief in the value of such tests of innocence remained unshaken, there was clearly no need to extract confessions by means of torture; but with the increase of civilization that belief was gradually outgrown. Compurgation and the ordeal began to fall into disuse; and in 1215 the latter was given a fatal blow by the Lateran Council, which forbade priests to perform the

rites of the Church in connection with it, and thereby deprived it of the religious sanction on which rested its moral force. The wager of battle lasted somewhat longer, because the feudal nobility clung to it as a privilege of their class. In France, St. Louis and Philip the Fair strove to abolish it, and although their efforts were only partially successful, and were followed on each occasion by a revival of the practice, judicial duels became less and less frequent until they gradually disappeared altogether. As yet, however, no new form of criminal trial had arisen on the Continent to replace those which were fast becoming obsolete. A procedure by an inquest of sworn witnesses had, indeed, come into use in France; and if that country, like England, had possessed a centralized and powerful judicial organization, the inquest might perhaps have grown into trial by jury, as it did across the Channel. But the process, which could only be applied when the accused consented to submit to it, was far too crude to be effective, and the royal courts had not acquired vigor enough to develop it, or to create any enlightened legal system of their own, before the revival of the study of Roman Law, in the latter part of the twelfth century, prepared the way for an entire change in the principles of criminal procedure, and for the introduction of torture.

It has already been remarked that in the early Middle Ages no clear distinction was drawn between civil and criminal cases. Crimes were regarded as private wrongs, and their punishment was left entirely to the action of the persons injured; but a more effective means of repression was needed, and a bold departure was made at the close of the twelfth century, when Innocent III., in order to put an end to the scandals among the clergy, set up an inquisitorial procedure. It began by a secret inquiry on the part of the judge, followed by an interrogation of the accused, who was obliged to answer upon oath. With the attempts to suppress heresy during the thirteenth century this process hardened into the Inquisition, and the use of torture was borrowed from the Roman Law, on the principle that heresy was *crimen læsæ majestatis divinæ*. Thus torture reappeared in Europe at the very moment that the progress of civilization began to be rapid.

The new inquisitorial procedure, which was thoroughly in harmony with the spirit of Roman jurisprudence, was gradually adopted by the continental states, until at last prosecutions for crime were carried on almost exclusively by the judicial officers of the government; and of course they were conducted with greater

and greater secrecy. Under these circumstances it is not unnatural that torture should have been used. A man who was both judge and prosecutor, and who felt almost certain of a prisoner's guilt, but could not quite prove it, was strongly tempted to fortify his opinion by forcing a confession. He had no jury to relieve him of responsibility for the facts. Moreover, the practice saved him an immense amount of trouble. Sir James Stephen tells us that during the preparation of the Indian Code of Criminal Procedure in 1872 some discussion took place about the reasons which occasionally led native police officers to torture prisoners, when an experienced civil officer observed, "There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." This view of the matter will be readily understood by every one who has tried to hunt up evidence enough to prove an obscure case after becoming convinced of the facts in his own mind. Motives of this kind, backed by the all-powerful authority of the Roman Law, led quite naturally to the use of torture. But the thing that made the rack a regular systematic part of criminal procedure, instead of an exceptional resource, was the "theory of proof."

Almost any person who is called upon to judge a large number of offences of the same kind will find himself insensibly falling into theories of proof. He will find himself comparing the case at bar with others that have gone before, with the feeling that where the evidence is the same the judgment ought to be the same; that a state of facts which he thought was or was not sufficient to prove guilt in former cases ought to have a similar effect on his opinion in the case under consideration; and thus he will frame a more or less clearly defined standard or rule of proof. With the scientific jurist the process is more conscious than with other men, and the standard or rule tends to become more elaborate and precise. Now this process went on in the minds of the continental lawyers from the fourteenth to the seventeenth century, until at last the principles evolved became so rigid that the judge was looked upon almost as a machine, deciding without regard to his personal impressions. The rules were supposed, like an instrument in a physical laboratory, to furnish an absolute test which relieved him from the necessity of weighing in his own mind the evidence before him.

In its conception the theory of proof appeared to be eminently humane, for it was based upon the principle that no man ought to

be convicted of a grave crime unless the evidence was absolutely conclusive, — clearer than daylight, as the phrase ran. Proof of this character was said to be complete, and without it no condemnation could take place. The testimony of two eyewitnesses of the crime was enough for the purpose, and so was evidence from documents properly authenticated. A few presumptions held to be conclusive were also sufficient, such as the fact that the accused had been seen by two witnesses flying from the scene of a murder with a bloody weapon in his hand. But in the nature of things such evidence was rare, and in the great majority of cases it was necessary to build up a complete proof by other means. With this object evidence was divided into proximate and remote indications of guilt; the former comprising the testimony of a single witness, documents imperfectly authenticated, extrajudicial confession, and a multitude of presumptions, some of them extremely feeble, such as the quality of the accuser and the accused. The remote indications were weaker still, occasionally absolutely frivolous, as the evil mien of the prisoner, for example. Indications of guilt did not furnish by themselves sufficient proof to convict, but a strong proximate indication, or a feebler one coupled with one or two remote indications, was enough when combined with confession under torture to establish the complete proof required. The result is obvious. Except in the rare cases where the crime had been committed in the presence of two witnesses, and the still rarer ones of proof by documents or conclusive presumptions, the prisoner was stretched upon the rack; and in fact the chief effect of the doctrine of indications was to permit the use of torture. When one reflects upon the agony that flowed for centuries from an erroneous legal theory, the cold, hard subtlety of the human mind assumes an aspect that is truly diabolical.

It is clear that a theory of proof can exist only in criminal cases. A theory of evidence, regulating the admissibility of testimony, can apply to all trials; but the doctrine of proof clearer than daylight, like the common law principle of proof beyond reasonable doubt, could be applied to crimes alone. In a civil case it would be unjust not to decide in favor of the side that appears on the whole to be in the right, that is, the judgment must depend on the mere balance of evidence, and hence neither party can be required to make the proof of his case absolutely conclusive. The theory of proof, with torture as its companion, was therefore limited to criminal cases, and in fact it was applied only to offences punished by death or mutilation.

The history of criminal process during the time when torture prevailed may be traced most readily in France, and there its most complete development was embodied in the Ordinance of 1670. The procedure established by that statute was briefly as follows. Except when the culprit was seized in the act, the process began by an information emanating from the Procurator of the King, that is, the district attorney, or from an individual, or from the judge's own motion. In any case, the first step was to summon the witnesses, who were examined separately and secretly by the judge, their depositions being taken down in writing. These depositions were then submitted to the procurator, in order that he might decide whether there was sufficient ground for prosecution or not. If he determined to proceed, the accused was summoned, or in the case of grave crimes arrested, and questioned upon oath by the judge, the answers, like every other part of the procedure, being carefully reduced to writing. The art of interrogating a prisoner so as to entrap him was one of great importance to the judge, and the treatises on criminal law contain many precepts on the subject. The examination was conducted in private by the judge and his clerk, and in fact in the case of crimes punishable with death, which it must be remembered were exceedingly numerous, the prisoner was not allowed to communicate with, or be defended by, counsel at any stage of the proceedings, from arrest to final judgment. The examination of the prisoner ended the preliminary investigation, and if he had confessed his guilt, and the evidence so far obtained was sufficient in the opinion of the procurator to warrant a conviction, he could, in the case of slight offences, ask for an immediate judgment by the court. Otherwise the more serious part of the proceedings began, and, except in the rare instances when a trial by inquest was ordered, they followed what was still called the *procès extraordinaire*, although it was in fact the form pursued in the vast majority of cases. The witnesses were now summoned a second time, their previous depositions were read, corrected if need be, and sworn to by them. They were then brought face to face with the prisoner. This was the first opportunity he was given to learn the charges against him, or the evidence by which they were supported; but it afforded him little help in making his defence, because obstacles of all kinds were placed in his way. He was allowed, for example, to present objections to the credibility of any witness, but he must do it before the deposition of that witness was read to him. Then, after

the deposition had been read, he could propound questions in relation thereto, but if the answers changed in any substantial point the statements in the deposition, the witness was guilty of perjury, and as that was a capital crime he had the very strongest motive for refusing to admit the possibility of mistake, and for backing up his previous assertions by falsehood if necessary. The chance of breaking down the testimony under such conditions was, to say the least, extremely small. The most surprising obstacle in the prisoner's way was, however, the strange rule about evidence of innocence. The prisoner was at liberty to set up a special positive defence, — such as an alibi, self-defence, or insanity, — and name his witnesses, who were thereupon summoned by the judge and examined secretly in his absence. But this privilege, meagre as it was, covered all the evidence he was permitted to offer. He was not allowed to produce witnesses to contradict the main charge against him, on the principle that unless the proof of his guilt was absolutely conclusive he could not be condemned, and if it fulfilled that requirement it must logically be impossible to contradict it, — a principle that suggests the farmer, elected a local judge in one of the rural districts of New York, who remarked, at the end of his first petty criminal trial, that after hearing the case for the government he had been clear for conviction, and that he would never listen to the evidence on both sides again, for it was very confusing to one's judgment. Montesquieu comments on the fact that by the French law of his day the prisoner was not allowed to produce evidence to disprove his own guilt, that he was tortured, and that perjury was a capital offence, while in England the opposite was true in each case, and he remarks that the three principles go together. They were all, in fact, logical deductions from the theory of proof. The relation of that theory to torture and to the refusal to hear witnesses for the defence has already been pointed out, and as regards perjury it is evident that, if the prisoner's guilt were to be decided solely on the testimony of the witnesses for the prosecution, their veracity must be insured by the strongest sanction possible.

The elaborate record of the case, containing all the depositions, examinations, and documents, in short, the whole of the evidence, was now delivered to the procurator, who was entitled to demand a judgment upon it by the full court. In prosecutions for grave crimes, however, where the theory of proof applied, he did so only in case the complete proof required for conviction had already

been obtained. This was, of course, rare, and hence the procurator usually asked first for the torture of the accused, which was ordered if the indications of guilt disclosed by the evidence were deemed strong enough to warrant it. In other words, the prisoner was tortured whenever his confession was necessary and sufficient to make out the complete proof of his guilt, and that was usually the case.

In the application of torture, as in all other parts of the criminal procedure, we find an ostentation of principles professedly humane combined with frightful cruelty in practice. Thus laws that neither life nor limb should be endangered were often enacted, and as persistently disregarded. There were statutes, moreover, forbidding a repetition of torture, but they were commonly evaded by the pretence that the examination was merely continued from time to time and not repeated. In France, it is true, the Ordinance of 1670 at last put an effectual stop to this custom, but it was almost the only mitigation of criminal procedure that took place. In other respects it grew steadily more and more rigorous. Again, it was a principle universally acknowledged that a confession extorted by pain was invalid unless freely confirmed afterwards, but if the prisoner retracted he was tortured once more. In some places the process could be repeated indefinitely, in others only a limited number of times, but in any case the principle was a source of renewed suffering rather than a means of escape from punishment.

After the *instruction*, as the taking of the evidence was called, had been completed, the record was delivered to one of the judges, who prepared a report of the case for the full court. This judge was sometimes the same man who had conducted the examinations, and in any case the voluminous length of the record and the fact that no counsel were heard on either side, gave his report a decisive weight with his colleagues. The prisoner was, indeed, interrogated by the court, and allowed to make a statement, but with the highly technical ideas of proof that prevailed his words could not have much effect. The formality of the last interrogatory over, the court rendered its judgment and imposed the sentence.

It will be observed that the whole proceeding was not a trial in the sense in which we use the term. It was not a struggle between two parties, one trying to prove a charge, and the other to disprove it, before an impartial tribunal. It was strictly an inquisition,

in which the judge attempted to detect a crime, and satisfy himself by his own efforts of the prisoner's guilt. It bears a considerable resemblance to the case of a physician called upon to certify whether a man ought to be committed to an insane asylum or not. He inquires of the friends or neighbors about the man's behavior, and he does it when the man is not present. He questions the man himself, and, what corresponds to the use of torture although without the cruelty, he may subject the patient to some medical test. He does not profess to conduct a trial in which the lunatic has a fair chance to defend himself. He simply tries to satisfy himself about a fact. This is surely the only point of view from which the inquisitorial procedure of continental Europe can be understood. That torture should have formed a part of such a process is not surprising, for until a little more than a century ago the world had never reached such a degree of civilization as to discard torture from motives of humanity. The thing that excites surprise and indignation is the inexorable "theory of proof," which made torture an almost invariable accompaniment of every trial, although the proof was morally and rationally strong enough without it, and sometimes when the indications of guilt were to a normal mind absurdly small.

Of the actual effect of torture in the condemnation of the innocent it would be rash to speak in general terms. The world is now convinced that no reliance whatever can be placed upon it as a means of discovering the truth; and there is no need at the present day to recount stories like that of Philotas accused of conspiring against Alexander, who cried to his tormentors that he would confess if they would let him go, but when unbound asked what they would like to have him confess. With what terrible effect the relentless procedure could be used against the innocent is shown by the trials for witchcraft in Germany, and the epidemic of convictions for poisoning wells in Northern France. In fact, the very similarity in the long catalogue of confessions in these cases, which seemed to the judges the clearest proof of guilt, appears to us conclusive evidence that the statements had no foundation, and were invented solely to escape suffering by satisfying the court. But, on the other hand, a magistrate whose life was spent in dealing with crime must have learnt by experience a great deal about criminals. He must have acquired the power of forming a shrewd opinion on the guilt of the prisoners before him; and it can hardly be supposed that, where neither popular fanaticism,

nor political rancor, nor private prejudice was involved, he would deliberately send innocent men to execution. The theory of proof purported to reduce the judge to a mere machine, but any definition of the indications required to put a prisoner to the torture was of necessity somewhat vague, and it is inconceivable that the judge should not in ordinary cases have been guided by his own belief in the guilt or innocence of the accused.

The use of torture was not entirely confined to procuring the conviction of a prisoner by extorting his confession. It was also occasionally used for witnesses who were believed to be concealing the truth, and it was a regular engine for compelling a condemned criminal to reveal his accomplices; but neither of these cases has any interest from the point of view of criminal procedure, or the evolution of juridical ideas.

With the growth of the sentiment of humanity in the last century the idea of torture became by degrees intolerable, Voltaire and his contemporaries attacking it furiously until it was generally condemned by public opinion on the Continent. One of the first steps towards its abolition was taken in 1740 by Frederick the Great, who forbade its use except in cases of treason and atrocious crimes, and his example was followed in other countries. In France, torture as a part of the process of trial was legally, but not quite effectually, forbidden in 1780; and finally the French Revolution gave a death blow to the practice throughout Europe, although it was not entirely swept away everywhere until the present century. In this age of anæsthetics, when we shrink from all physical pain, it makes one shudder to think how recently the deliberate infliction of exquisite suffering was a regular part of criminal trials. One can understand it only by reflecting that the bounds of human sympathy widen slowly; that over most of the civilized world the suffering of animals excites as little pity now as that of criminals did a hundred and fifty years ago.

One closing word about the French criminal trial at the present day. Torture was abolished at the Revolution, but the main outlines of the system of procedure of which it formed a part were left unchanged; and in fact the modern French trial for the graver classes of crimes is in substance the old inquisitorial process with the torture left out, and a jury somewhat inharmoniously tacked on. It is begun by the *juge d'instruction*, who examines separately, secretly, and in the absence of the accused, all persons having any knowledge of the affair, their depositions being, of course, carefully

taken down. The judge then interrogates the supposed offender in the same secret way, and without the presence of counsel. In fact, he has power, by orders issued for ten days at a time, to keep the prisoner in solitary confinement for an indefinite length of time, in order to try to obtain a confession, or at least corroborative evidence of guilt. The period of detention is sometimes very long, and it is asserted that occasionally the harshness of treatment comes very near to actual torture. The information obtained from every source is carefully recorded by the judge in the form of memoranda called *procès verbaux*, and if there is evidence enough to warrant a trial these are submitted, with the depositions and other documents, to the Chamber of Accusation, a body composed of members of the court that is to try the case, but not containing the judges who are to sit at the trial. The chamber hears no witnesses, but reviews the evidence, and if of opinion that the case ought to proceed, draws up an *arrêt de renvoy*, which corresponds to our indictment. The procurator then prepares an act of accusation, which is supposed to be a bare statement of the crime, but is in fact an argument for the government, and as such has a decided influence on the result. The preliminary part of the case, however, is not yet quite over, and before the prisoner is allowed to see his counsel, or to have copies of the indictment and the depositions, he is once more questioned, — this time by the judge who is to preside at the final hearing.

The last interrogation of the accused is a sort of prelude to the trial, and has the effect of enabling the presiding judge to conduct successfully a rigorous cross-examination of the prisoner. This examination is a very important part of the proceedings, and occurs immediately after the reading of the act of accusation with which the trial opens. After the cross-examination, the procurator addresses the jury, and then the witnesses are called. These, however, do not testify in the manner to which we are accustomed. It is important, if not essential, to a fair trial by an inexperienced body of men like a jury, that evidence should be excluded which has in reality very little bearing on the case, but would be likely, by raising a prejudice, to have far more weight with them than it deserves. In other words, rules of evidence are almost a necessity in trial by jury; and in Anglo-Saxon courts their observance is secured by allowing a witness to speak only in answer to definite questions, so that the judge and the adverse party hear each fragment of evidence offered, and can object to it before it is actually

given. But in France, where jury trial is recent, no rules about the admissibility of evidence have developed, and each witness says whatever he pleases, tells his story in his own way, and cannot be interrupted. After he has finished he can be questioned by the presiding judge, and, with the consent of the court, by the jurymen and the procurator also; but he cannot be effectively cross-examined by the prisoner or his counsel, for they are not allowed to interrogate him directly, and can do so only by the cumbrous process of suggesting questions to be asked by the president. An acute Japanese observer has remarked that the true glory of Anglo-Saxon procedure lies not so much in trial by jury as in the art of cross-examination; but this is really practised in France only on the side of the prosecution. In the case of the prisoner himself, it is, indeed, continually repeated throughout the trial; for no sooner has a witness finished his statement than the prisoner is interrogated in regard to it. To cross-examine the prisoner with the utmost severity, and not give him a chance to cross-examine freely the witnesses against him, seems to us a strange inversion of principles.

When the evidence is all in, the jury is addressed by the procurator, and by the accused or his counsel, and formerly a final summing up of the case was made by the presiding judge; but as that officer was felt to be too much biased against the accused, his right to sum up was abolished in 1882. The jury then retire with a list of questions of fact which they must answer *Yes* or *No*, their answers forming the basis for the judgment of the court.

The reader will observe, what was stated at the outset, that the modern procedure is in its main outlines the old one with the torture left out and a jury incongruously tacked on. The preliminary process still consists of an attempt by a magistrate to unravel a crime and collect evidence of guilt. It is strictly inquisitorial and secret, and except for the omission of physical torture it has remained substantially unchanged. The second part of the process has been modified in a much greater degree, for the presence of the jury has brought publicity and destroyed the theory of proof. And yet even here the old inquisitorial traditions are clearly seen in the treatment of the prisoner and in his inability to cross-question the witnesses directly. One cannot help feeling at every turn that he is the subject of an inquest, rather than a party to a trial. In one respect the existence of the jury has made the procedure less fair. Formerly the evidence collected by the

magistrate was delivered to a fresh body of judges, who were expected to examine and decide upon it impartially. Now this is done only by the Chamber of Accusation, which formulates the indictment; for at the trial before the jury the presiding judge has been to some extent transformed into an advocate, whose professional pride is involved in procuring a conviction. Herein lies the root of the inconsistency in the whole procedure. The real trial is still carried on, as of old, by the professional magistrates in secret, and the public trial involves an effort on their part to induce the jury to ratify the conclusion already reached. It is said that the professional magistrates are just, and that an innocent man rarely comes before the jury at all. This is no doubt true, but it does not cure the inherent defect of the procedure. It does not obviate the fact that the attempt to combine the French and English systems of trial has placed the presiding judge, the jury, and the prisoner in false relations to one another.

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[*To be continued.*]